

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEECLIFTON JEROME MOORE,

Defendant-Appellant.

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UNPUBLISHED

September 20, 2007

No. 269246

Kent Circuit Court

LC No. 05-009552-FC

Before: Sawyer, P.J., and White and Talbot, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. The instructional error was of constitutional proportion because it completely eliminated an element of the offense. Further, the error was not harmless.

I agree that generally an instructional error is nonconstitutional error. *People v Dumas*, 454 Mich 390, 408; 563 NW2d 31 (1997), MCL 769.26. However, “an error in omitting an element of the felony murder instructions would be an error of constitutional magnitude.” *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). Here, the trial court failed to instruct on the malice element of felony murder. Thus, because the error is of constitutional magnitude, and was preserved, the prosecution must establish that the error is harmless beyond a reasonable doubt. *Id.* at 774.

Additionally, when viewed as a whole, the instructions did not fairly present the issues to be decided or protect defendant’s rights. The court instructed that the only necessary intent was that required to prove the underlying offense of first-degree child abuse, i.e., that defendant either intended to cause serious physical harm, or knew that serious physical harm would result. Serious physical harm or injury, as defined by the statute and the trial court, is not the equivalent of the great bodily harm that establishes malice. Serious physical injury or harm includes any injury that seriously impairs the child’s health or well-being, including sprains, fractures, dislocations and serious cuts. Further, the court gave an additional instruction that undermined the third-prong of malice, i.e., a willful and wanton disregard of the likelihood that the natural tendency of the defendant’s act is to cause death or great bodily harm.

The court instructed:

It's alleged that [defendant] murdered Armon in the course of subjecting him to the crime of child abuse in the first degree.

So there are now basically four things that are to be proven beyond a reasonable doubt by the evidence presented at this trial for you to say that you are satisfied that that charge of murder in the first degree, the felony form of murder in the first degree . . . has been established.

Number one, it has to be proven that [defendant] caused serious physical harm to a child. Statute says a child is anybody younger than 18. The statute also defines what it means by serious harm. And, it means this: *Any physical injury to a child . . . that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, a subdural hemorrhage or hematoma, a dislocation, a sprain, internal injury, poisoning, burn, scald, or severe cut.*

The list isn't exclusive. It says . . . including, but not limited to. If it's one of those things, it qualifies as a serious physical injury. And it can be a serious physical injury, even if it's something else, so long as it seriously impairs the child's health or physical well-being.

We're not talking about death. What we're going to talk about here, is that of a serious physical injury or the kind that I described was perpetrated and that death resulted.

The first thing that has to be proven is that [defendant] caused some very serious physical harm or injury to a child . . . If it was done to someone under 18, then this first element has been proven.

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The second thing which has to be proven is that [defendant] either . . . intended to cause serious physical harm to the child or that he knew that serious physical harm would be caused by his actions.

The law does not make crimes out of the accidents. Therefore, for this crime to have occurred, [defendant] must have, number one, intended to strike the child, and then he must have also intended that, as a result, the child be seriously hurt physically or that he knew that the child would be seriously hurt, physically, by virtue of whatever conduct he was engaging in.

Now "intended" simply means that [defendant] wanted Armon to sustain serious physical injury. To know that that was going to happen means, even though that's not what he wanted to happen, he was aware, appreciated, or understood that a serious physical injury would be the consequence of what he was doing to the child.

So he has to have intended that it happened, meaning he wanted a serious injury to happen or he knew that a serious injury would happen.

It's not sufficient for the evidence to satisfy you that, given all the circumstances, [defendant] should have known, been aware, appreciated, figured out what were going to be the consequences. He has to have intended those consequences or actually have known that those were going to be the consequences, namely serious physical injury.

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Now both intent and knowledge can be proven circumstantially. Sometimes people announce in so many words what they're thinking . . . But, they don't do that very often. That doesn't mean that you can't figure it out . . . or that it's an impossible issue to resolve here. It simply means you have to look at all the circumstances and try, if you can, to deduce what happened. Look at what was actually said, what was actually done, both before and after, for whatever that reveals to you about what was intended and/or known . . . at the time.

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The third thing that has to be proven is that at the time he injured Armon, if you decide that he did, [defendant] was caring for the boy.

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Now if it's proven that [defendant] injured a child in a serious physical way, that he intended for that injury to occur or knew that it was going to occur, and that he was caring for the child at the time, that's child abuse in the first degree.

*So if—this is the fourth element—the child then dies as the result of the serious physical injury, it's murder, and murder in the first degree, because the statute says it happens in the course of committing child abuse in the first degree. It does not have to be proven that [defendant] intended for the child to die or even that he appreciated that the injury would kill the child. He has to have intended serious physical harm, or he has to have known or been aware that serious physical injury would result. But that's as far as the intent element has to go. You don't have to know that death is also possible. Even if death is an unlikely consequence. But, it happens. If you intended serious physical injury or knew that serious physical injury was going to occur, and then death occurs . . . then we're talking about murder in the first degree. [Emphasis added.]*

Defendant's intent was the contested issue at trial. The combination of the court's omission of the malice element and the court's affirmative instruction that defendant should be convicted of felony murder even if the jury concluded that he did not know that death was possible, and even if death was unlikely, as long as defendant intended serious physical injury, as

defined above, or knew that serious physical injury was going to occur, undermines the reliability of the verdict. I would reverse and remand for a new trial.

/s/ Helene N. White